# Damages for breach of an arbitration agreement

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**Subject**: Arbitration. **Other related subjects**: Contract; Shipping

**Keywords**: Arbitration; Contracts; Damages; Equitable remedies; Privity of contract

# Abstract

*For a party to an arbitration agreement to bring an action other than in the agreed forum is a breach of an arbitration agreement. Damages are not usually an appropriate remedy, but recent years have seen the courts awarding substantial damages for breach of arbitration and similar agreements. This article considers the basis, upon which damages should properly be awarded, on the assumption that normal contractual rules should apply. Both common law and equitable damages have been awarded, and the article considers the proper role for both. It suggests that the courts do not always pay proper regard to principle, the reasoning in the cases too often being clouded by other considerations.*

# Introduction

Arbitration agreements are contractual in nature,[[1]](#footnote-1) but it is not obvious that damages are an appropriate remedy for their breach. In UST-Kamenogorsk Hydropower Plant JSC v AES UST-Kamenogorsk Hydropower Plant LLP, Lord Mance observed that an "agreement to arbitrate disputes has positive and negative aspects",[[2]](#footnote-2) the former being the positive duties placed on the parties to the agreement. For breach of the positive aspects, for example failing to appoint an arbitrator, or delaying taking necessary steps, the provisions of the Arbitration Act 1996 usually provide a remedy, and by s. 1(c), "in matters governed by this Part the court should not intervene except as provided by this Part". In Heyman v Darwins Ltd, Lord Macmillan observed that whereas breach of an ordinary contract:[[3]](#footnote-3)

"... results only in damages, the arbitration clause can be ... enforced by the machinery of the Arbitration Acts. The appropriate remedy for breach of the agreement to arbitrate is not damages, but its enforcement."

This will be all the more true today, the provisions of the current Arbitration Act being far more comprehensive than those of 1934, the applicable provision at the time of Heyman v Darwins. Damages will therefore not normally be appropriate for failure to comply with the positive aspects of an arbitration agreement.[[4]](#footnote-4)

 In UST v AES, Lord Mance continued, on the negative aspects:[[5]](#footnote-5)

"A party seeking relief within the scope of the arbitration agreement undertakes to do so in arbitration in whatever forum is prescribed. The (often silent) concomitant is that neither party will seek such relief in any other forum. If the other forum is the English court, the remedy for the party aggrieved is to apply for a stay under section 9 of the Arbitration Act 1996."

In other words, to take proceedings in an English court would be a breach of the arbitration agreement, but it remains far from obvious that damages are an appropriate remedy. In Bristol Corp v John Aird & Co,[[6]](#footnote-6) Lord Moulton observed that damages were "... utterly ineffective, since no damages could be proved in such a case". The argument is no longer that the Arbitration Act is a complete code, but instead that loss will be impossible to prove. Moreover, as Cooke J observed in The Alexandros T, even if loss could be proved:[[7]](#footnote-7)

"[damages] would, for all the reasons given in the authorities, be an inadequate remedy for breach of such [an arbitration] clause since its very nature requires the parties to have their disputes determined in arbitration. A party to such an agreement should not be put to the trouble of having disputes determined elsewhere in a manner contrary to the express contract between the parties."

In Bristol Corp v John Aird & Co,[[8]](#footnote-8) Lord Moulton contrasted with this inadequate and ineffective remedy what eventually became the stay of action,[[9]](#footnote-9) and in UST, Lord Mance regarded the stay as the remedy, where action is brought in an English court.[[10]](#footnote-10)

 No doubt, where English arbitration has been agreed, substantial damages will normally indeed be impossible to prove, because that would imply the court awarding damages where the arbitral tribunal would not. Even were the arbitral tribunal required to apply a foreign substantive law, one would expect this to be mirrored in a court action. There might be increased costs involved, but that should be the limit of any damages recoverable. A circumstance where there might conceivably be a disparity is where the tribunal is required to determine a dispute "in accordance with ... other considerations", as allowed under s. 46(1)(b) of the Arbitration Act 1996. This provides for equity clauses which might, it has been noted, include "amiable composition" or "general considerations of justice and fairness".[[11]](#footnote-11) It is appropriate to note here only that they are rare, and that there is considerable doubt about now such clauses might work.[[12]](#footnote-12) Nonetheless, for a party to sue in court to avoid such a clause could probably, in principle, give rise to a real loss and hence substantial damages. In general, however, to ensure, as Cooke J required, that a party to an arbitration agreement "should not be put to the trouble of having disputes determined elsewhere", is achieved by a stay of action, not by an award of damages.

 It is a different matter where the breach consists of bringing proceedings abroad. Now it is entirely possible that a foreign court, perhaps applying the law of its own country, might award damages where an English arbitral tribunal would not,[[13]](#footnote-13) in which case substantial damages might, in principle at least, be obtained for breach of the arbitration agreement. Even in this case, for the reasons adumbrated by Cooke J,[[14]](#footnote-14) damages may not be a satisfactory remedy. A stay of action would, of course, be ineffective, but an anti-suit injunction can be used, as long as the defendant is in the jurisdiction. This is a remedy which should normally be available, as indeed in UST and The Alexandros T themselves, where the defendant was acting in breach of contract, in bringing the foreign proceedings.[[15]](#footnote-15)

 There are two main reasons why damages have been sought in recent cases, where the equitable remedy, usually more appropriate, has been either unavailable or unsuitable. The first is where foreign proceedings have been brought within the EU, since in The Front Comor the European Court of Justice held that an anti-suit injunction is not available, in court proceedings, to restrain a person (in breach of an arbitration agreement) from commencing or continuing proceedings in another Member State.[[16]](#footnote-16) The second is where an injunction has been granted to restrain proceedings outside the EU, but later ignored. Of course there can be contempt proceedings in such a case, but damages are also appropriate to compensate for loss that has now been suffered.[[17]](#footnote-17) Since in these cases, the reason for bringing the foreign proceedings is often because the action would not succeed in the UK (or other agreed forum), it is no longer true that damages are "utterly ineffective", and substantial loss will often now be provable. Cooke J's observations still hold, however, and damages, even if substantial, may still be an inadequate remedy.[[18]](#footnote-18)

 The damages cases (discussed below) are not entirely satisfactory, and extraneous considerations appear to be affecting the development of the law. In their understandable desire to ensure effective enforcement of arbitration, and other agreements obliging parties not to seek redress in foreign courts, the courts are taking an overly generous approach to the damages award, not always justified in terms of general contractual doctrine.

# The Front Comor

Though it was only in Flaux J's judgment, in the last act in the extensive Front Comor saga, that damages were an issue, and though earlier stages of the saga have been extensively covered elsewhere,[[19]](#footnote-19) a brief re-examination is in order, aspects of the case being relevant to the present discussion.

 The Front Comor was chartered on a form which provided for English law and arbitration,[[20]](#footnote-20) the clause covering "[any] and all differences and disputes of whatsoever nature arising out of this charter". An incident occurred causing damage to property belonging to the charterers, and the charterers' insurers, having paid out under the policies, took proceedings against the shipowners. They did not seek English arbitration, but sued instead in the Tribunale di Syracuse in Sicily (where the incident occurred), perhaps hoping that a defence that was available in English law would not avail the shipowners in Sicily.[[21]](#footnote-21)

 Had the Sicilian court found in the insurers' favour, substantial loss might well have been occasioned to the owners from what was, they claimed, a breach of the obligation to arbitrate.[[22]](#footnote-22) They might well have chosen to seek damages. Initially, however, the case pursued a different path. An interim anti-suit injunction having been granted by Gross J, restraining the action in Sicily, the insurers argued before Colman J that it should be discharged.[[23]](#footnote-23) The insurers did not claim under the charterparty (the property damaged was not cargo on board the ship), but in delict (tort), relying on their rights of subrogation under the Italian Civil Code. There was, however, previous authority that a tort claim fell within the wording of a similarly-worded arbitration clause, as long as there was a sufficiently close connection between the tortious claim and a claim under the contract,[[24]](#footnote-24) and far from discharging the injunction, Colman J acceded to the shipowners' argument that it should be made permanent. The basis was essentially that identified in The Angelic Grace,[[25]](#footnote-25) to protect the claimant's contractual rights under the arbitration agreement; the subrogated insurers were claiming through the charterers, and hence were not entitled to assert claims which were inconsistent with the charterparty.

 Though the early proceedings in The Front Comor revolved around an injunction rather than damages, aspects of Colman J's judgment are relevant to the present discussion. In the first place, the defendant was not (unlike the defendant in The Angelic Grace) the charterer himself, but his subrogated insurer, and hence a third party to the charterparty. An insurer is not subject to contractual burdens, and the defendant therefore claimed that he could not be in breach of contract, by commencing proceedings in Sicily. In The Hari Bhum, Clarke LJ had taken the view that damages could not have been awarded against the third party there,[[26]](#footnote-26) whose claim (like that of the insurers in The Front Comor) was held in substance to be based on the contract.[[27]](#footnote-27) Colman J, adopting the principles of The Jay Bola,[[28]](#footnote-28) held that this did not preclude the issue of an anti-suit injunction. Essentially, the insurers were claiming through the contracting party, and their rights were therefore conditional on the other terms of the contract, including the arbitration clause. This is conditional benefit, rather than transfer of burdens as such.[[29]](#footnote-29)

 The availability of an injunction against a third party to the contract was affirmed in The Yusuf Cepnioglu,[[30]](#footnote-30) and the Arbitration Act itself applies similar principles to the stay of action.[[31]](#footnote-31) This is also relevant to the possibility of equitable damages, an important tool in the armoury of claimants, whether or not common law damages could be awarded for breach of contract.[[32]](#footnote-32)

 Secondly, and also of relevance to the discussion here, Colman J awarded the injunction in spite of the Brussels Jurisdiction Convention, which is required of EU member states by EC Regulation No. 44/2001.[[33]](#footnote-33) This provision, having set out jurisdiction rules, accords primacy to the court first seised.[[34]](#footnote-34) Courts within the EU are trusted to decline jurisdiction in appropriate cases. In Turner v Grovit,[[35]](#footnote-35) the European Court of Justice had taken the view that it was inconsistent with the mutual trust accorded to the courts, and hence inconsistent with the Convention:

"... to grant restraining orders against defendants who are threatening to commence or continue legal proceedings in another Convention country ..."

The foreign proceedings sought to be restrained in Turner were unconscionable, but Turner was not an arbitration case. Had it been, Art. 1(2)(d) disapplies the Regulation in respect of arbitration, recognition and enforcement of which are governed by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. (This is also relevant later.)[[36]](#footnote-36) New York requires any court to defer to a valid arbitration agreement,[[37]](#footnote-37) and Art. 1(2)(d) is intended to ensure that Brussels does not conflict with it, or other international agreements on arbitration.[[38]](#footnote-38) The court seised is trusted to apply the New York Convention, and stay proceedings where there is a valid arbitration agreement.[[39]](#footnote-39) If the court acts properly, the provisions should therefore intermesh well enough, but differences can arise over the validity or applicability of an arbitration agreement, and the Sicilian court would probably not have recognised it as applying in The Front Comor.[[40]](#footnote-40)

 The central issue in The Front Comor, then, once the case had gone beyond first instance, was whether the principles in Turner applied to an anti-suit injunction issued to restrain proceedings brought in breach of an arbitration agreement, given the exclusion of arbitration from Brussels. On this issue, Colman J was bound by The Hari Bhum,[[41]](#footnote-41) a case which, unlike Turner, did concern an arbitration clause, whose application would be thwarted by action taken abroad. The Court of Appeal had there held Turner inapplicable to arbitration. There was therefore no objection to the grant of the injunction.

 Colman J being bound by Court of Appeal authority, the insurers took a leapfrog appeal to the House of Lords on the issue of the applicability of Turner.[[42]](#footnote-42) The House agreed with Colman J, Lord Hoffmann taking the view that arbitration should be entirely outside the Brussels regime.[[43]](#footnote-43) However, because the "question referred is one of very considerable practical importance on which different views have been expressed by national judges and writers", the House referred to the European Court the question whether it was consistent:[[44]](#footnote-44)

"... with EC Regulation 44/2001 for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings in another Member State on the ground that such proceedings are in breach of an arbitration agreement?"

Taking the opposite view to that of the House of Lords, the European Court of Justice ruled that to issue the anti-suit injunction was inconsistent with the Regulation.[[45]](#footnote-45) The difference revolves around how arbitration is excluded. The English courts took the view that the Regulation had no application at all, whereas the ECJ would have trusted the court seised to stay its own proceedings.

 The exclusion of arbitration from the Brussels regime is relevant to the discussion of damages, later in this article.[[46]](#footnote-46) The Front Comor is also relevant because it creates a situation where the normally appropriate remedy of the anti-suit injunction cannot be awarded, and other remedies, such as damages, accordingly gain in importance.

 The principle rationale for Turner is that anti-suit injunctions can breach the mutual trust necessary for a compulsory system of jurisdiction, albeit that they do not interfere directly with the foreign courts.[[47]](#footnote-47) As Flaux J later observed:[[48]](#footnote-48)

"... the whole basis of the decision in Turner v Grovit [is] that the court second seised has to defer to the court first seised on the basis of the principle of mutual trust ..."

The same mutual trust basis can also be seen in The Front Comor, where the European Court adopted the views of the Advocate General.[[49]](#footnote-49) The rationale for the decisions in Turner and The Front Comor is relevant to later discussion here.[[50]](#footnote-50)

 All of this applies only as long as Turner v Grovit and The Front Comor remain good law. With the impending exit of Great Britain and Northern Ireland from the EU, the prospects of these cases are probably bleak, for long-term influence on English law. However, the White Paper on the Great Repeal Bill recommends retention of EU-derived case law as it exists on the day we leave the EU,[[51]](#footnote-51) proposing that "historic CJEU case law be given the same binding, or precedent, status in our courts as decisions of our own Supreme Court".[[52]](#footnote-52) These recommendations have been adopted in the European Union (Withdrawal) Bill 2017.[[53]](#footnote-53) The consequences of Turner v Grovit and The Front Comor will therefore persist, unless and until the Supreme Court overrules them, or their effects are reversed by legislation.

 There is a quite separate argument that The Front Comor does not survive Brussels Regulation Recast,[[54]](#footnote-54) or even that it is wrong.[[55]](#footnote-55) Neither of these propositions is clear beyond doubt, but even if The Front Comor is no longer law, there are other reasons why damages may be sought, rather than relying solely on the equitable remedies.[[56]](#footnote-56)

# Other remedies

The European Court's decision did not, directly at any rate, affect any remedies other than the anti-suit injunction. That being so, London arbitration proceedings, which had already been instigated by the owners, continued, culminating in the declaration of non-liability which they sought,[[57]](#footnote-57) and a fresh tribunal was appointed to determine whether,[[58]](#footnote-58) in the light of the European Court decision, it had jurisdiction to award damages against the insurers, for breach of the arbitration agreement, in respect of the legal fees and expenses reasonably incurred in connection with the Italian proceedings. Another issue was whether the insurers were liable to indemnify the owners, if an award made against them in the Italian proceedings resulted in greater liability than would have been established in the arbitration. The arbitral tribunal took the view that it lacked the jurisdiction to award either the damages or the indemnity sought, and this was challenged on a s. 69 appeal (for error of law) which came before Flaux J. The issue before him was:[[59]](#footnote-59)

“whether the arbitral tribunal is deprived of jurisdiction to award equitable damages for breach of an obligation to arbitrate by reason of EU law?”

This differed from the issue of law on which the appellant was originally given permission to appeal, in the addition of the word "equitable", and substitution of "breach of an obligation to arbitrate" for "breach of an arbitration agreement". There is no explanation of these changes in the report of the case, other than a brief reference to the "statutory power under s. 50 of the Senior Courts Act 1981 to award equitable damages".[[60]](#footnote-60) This provision, headed "Power to award damages as well as, or in substitution for, injunction or specific performance", had its origins in Chancery Amendment Act 1858, often referred to as “Lord Cairns's Act”, which gave the Court of Chancery the power to award damages.

 Equitable damages would indeed seem, however, to have been more appropriate in The Front Comor. The arbitral tribunal's award occurred before the conclusion of the proceedings before the Tribunale di Siracusa (indeed, that Sicilian court had yet to determine its own jurisdiction).[[61]](#footnote-61) The owners were therefore concerned to protect themselves against breaches and losses which had not yet occurred. In respect of any award there would, as yet, be no common law damages, nor anything to indemnify, and in respect of legal fees and expenses, much of the expenditure was yet to be incurred. However, it has long been accepted that equitable damages can "compensate the plaintiff for future unlawful conduct the commission of which, in the absence of any injunction, the court must have contemplated as likely to occur".[[62]](#footnote-62) In a case such as this, equitable damages, if available, are more appropriate than those at common law.[[63]](#footnote-63)

 Flaux J must also have had in mind that the respondents in The Front Comor were the insurers and not the original charterers, and that therefore common law damages for breach of contract might not have been available.[[64]](#footnote-64) In The Hari Bhum, Clarke LJ thought that damages could not be awarded against a third party taking legal action abroad to avoid an arbitration clause, but that, in principle at least, an injunction could,[[65]](#footnote-65) and hence, presumably, damages in lieu of an injunction. This would explain both changes to the issue of law to be decided: the appellants were no longer claiming damages for breach of contract (the arbitration agreement), but only damages in lieu, in respect of an unspecified "obligation to arbitrate". However, for a court (or an arbitral tribunal) to grant an award of equitable damages in addition to, or in lieu of an injunction, it must initially have had the jurisdiction to award the injunction.[[66]](#footnote-66)

 Flaux J held that the arbitral tribunal had made an error of law in determining that it had no jurisdiction to award the damages and indemnity sought (in other words, he held that it did have jurisdiction).[[67]](#footnote-67)

 The arbitral tribunal had taken the view, based on views expressed by the Advocate General and the European Court,[[68]](#footnote-68) that there was a principle of effectiveness, which protected the insurers’ right to sue in Italy under Art. 5(3) of Regulation No 44/2001.[[69]](#footnote-69) It felt that it had to give effect to the "underlying philosophy" of the European decision,[[70]](#footnote-70) and the insurers, supporting the tribunal decision, argued that any "claim for damages or an indemnity was designed to dissuade the respondents from exercising their rights by making continuing with the proceedings in Italy academic".[[71]](#footnote-71) Consequently, "a claim for damages for breach of the obligation to arbitrate was just as much an illegitimate interference with the Italian proceedings as was the grant of an anti-suit injunction by the English court and ... in just the same way it would make it practically impossible or excessively difficult for the respondents to exercise the right under European law which the ECJ had recognised that they had".[[72]](#footnote-72)

 Flaux J noted the reluctance with which the tribunal had reached its conclusion,[[73]](#footnote-73) but did not address these arguments head on. He observed instead that the European Court decision had no application to an arbitral tribunal, as opposed to a national court. The Regulation, on its own terms, excluded arbitration proceedings, and even the Advocate General had recognised "that one effect of her opinion would be that an arbitral tribunal could reach a different decision from that of the court 'first seised'”.[[74]](#footnote-74) The tribunal (as opposed to the court) therefore had power to award damages. In principle, the quantum would have been anything recovered in the Italian courts that would not have been recovered in English arbitration, in addition, of course, to legal fees and expenses reasonably incurred in connection with the Italian proceedings. Since these are equitable damages, they would include an element to cover losses caused by future, as well as past breaches, in other words predicting, to some extent, what the Sicilian court was likely to do.[[75]](#footnote-75)

 Flaux J said nothing on whether equitable damages could have been obtained, had they been originally sought in court, rather than in the tribunal. Leaving aside EU complications, in English law a court has no explicit power under s. 44 of the Arbitration Act 1996 to award damages in support of arbitral proceedings. However, any court that has jurisdiction to award an anti-suit injunction can surely award equitable damages in lieu, and there is good authority that the jurisdiction to award the injunction arises under s. 37 of the Senior Courts Act 1981, not being constrained by s. 44 of the Arbitration Act 1996.[[76]](#footnote-76) To restrain suit brought within the EU, however, the court has no jurisdiction to grant an injunction because of the European Court decisions, and in the absence of jurisdiction to award an injunction, there is no power to award damages in lieu.[[77]](#footnote-77) Moreover, the tenor of the European Court judgment is that a damages action in court (as opposed to a tribunal) ought to fail, because in The Front Comor it would have rendered useless the action in the Sicilian court. That reasoning that applies to an anti-suit injunction applies equally to a damages action, in other words, whether these be equitable or common law damages, if the damages are such as to deprive the party going to court of any benefit in so doing.

  Since Flaux J's decision, in Gazprom Oao,[[78]](#footnote-78) the European Court has itself accepted that The Front Comor (ECJ) has no application to arbitration awards, or indeed even to their enforcement in court. The Regulation does not therefore preclude even awards of anti-suit injunctions by tribunals, and hence cannot preclude the award of damages in lieu. It follows that Flaux J's distinction in The Front Comor has been accepted at the highest level.[[79]](#footnote-79) It is a distinction that makes little sense,[[80]](#footnote-80) and to a large extent subverts the principles espoused in the European Court in The Front Comor. Even accepting the exclusion of arbitration from the Brussels regime, there is a good argument (on those principles) for trusting the court first seised to stay its own proceedings in appropriate cases. Nonetheless, this is the current position taken by the Court of Justice of the European Union.

 There is, however, an additional problem, of English rather than European law. Under s. 48(5)(a) of the Arbitration Act 1996, an arbitral tribunal in the UK "has the same powers as the court ... to order a party to do or refrain from doing anything". It follows that the tribunal can award an anti-suit injunction, or damages in lieu, but only if the court can. If the court cannot (as I have suggested), then neither should the tribunal have the power to do so. It might be different if the parties had agreed otherwise, under s. 48(1),[[81]](#footnote-81) but they had not done so in The Front Comor. Section 48(4) might also empower a tribunal to award damages at common law, whether or not that option is open to the court, but it can award equitable damages only if allowed to do so under English law.[[82]](#footnote-82)

 The problem facing Flaux J in The Front Comor was the (probably correct) perception that common law damages would not have given the appellants what they wanted. Neither the court nor the tribunal could have awarded an anti-suit injunction, however, and it is therefore impossible to justify the equitable damages that were in fact claimed.

# Alexandros T damages

Cooke J's observations on damages have been noted, in the first round of litigation arising from the sinking (with tragic loss of life) of The Alexandros T, and all her cargo.[[83]](#footnote-83) This case is not otherwise relevant to the present discussion. The bill of lading there incorporated an English law and arbitration clause in the head charterparty, but the cargo-owners' insurers, relying on subrogated rights, brought proceedings in China against the shipowners (among others). Cooke J awarded an interim anti-suit injunction, on grounds that were essentially similar to those adopted by Colman J in The Front Comor.[[84]](#footnote-84)

 An entirely different set of proceedings arose from a settlement agreement later reached between the owners and their hull insurers. Under the settlements, which were subject to the exclusive jurisdiction of the English courts, the parties agreed that proceedings between them would be stayed, and that the owners would indemnify the insurers against any claim that might be brought under the policy in relation to the loss of Alexandros T. The owners nonetheless later brought proceedings in Greece, whereupon the insurers sought relief in the English courts, alleging breach of the exclusive jurisdiction clauses. The owners applied for a stay of the English actions under the Brussels Jurisdiction Convention,[[85]](#footnote-85) but the case went to the Supreme Court, which held that they should not be stayed.[[86]](#footnote-86) The insurers then successfully claimed damages for breach of the jurisdiction clauses, the issue eventually being resolved in the Court of Appeal.[[87]](#footnote-87)

 This was a case, then, where damages were successfully sought against a party who was bringing proceedings in a court in the EU, in breach of agreement. The case concerned settlement, rather than arbitration agreements, but it has obvious implications for situations similar to that which arose in The Front Comor.

 Unlike the final case in The Front Comor saga, The Alexandros T did not reason in terms of equitable damages, and indeed equitable damages do not appear to have been sought. It appears to be a straightforward case of a court awarding ordinary common law damages for breach of contract. The breaches were of settlement agreements, which however shared with arbitration agreements that they contained a covenant not to sue, express in The Alexandros T settlements and usually implied in arbitration agreements.[[88]](#footnote-88) It is necessary to consider whether, and if so how, The Alexandros T applies where breach is claimed of an arbitration clause, by suing within the EU.

 The Alexandros T differed from The Front Comor in that there was no third party involved, the defendant owners being party to the settlement agreements of which they were in breach.[[89]](#footnote-89) As in The Front Comor, the foreign proceedings had not concluded, but future losses and breaches were dealt with in the Court of Appeal, by declarations of entitlement to an indemnity, the indemnities being expressly provided under the settlement agreements. Therefore, neither of the main reasons for the insistence on equitable damages in The Front Comor applied here.

 On the other hand, this was an award of a court, and did not, of course, trigger the Art. 1(2)(d) arbitration exception from the Brussels Regulation. It follows that the distinction adopted by Flaux J in The Front Comor, the Regulation not applying to the proceedings of an arbitral tribunal, could not apply.[[90]](#footnote-90) Longmore LJ, delivering the only judgment of substance, nonetheless found ways of avoiding Turner v Grovit. He thought it limited to anti-suit injunctions, and hence inapplicable to indemnity and damages claims.[[91]](#footnote-91) He also took the view that, in the light of the Supreme Court decision not to grant a stay of action,[[92]](#footnote-92) The Alexandros T did not fall within the mischief of Turner v Grovit at all,[[93]](#footnote-93) since the court in Turner had been concerned only to give effect to the EC Regulation, and indeed, the issue referred had related specifically to the Regulation. This narrow ground, which will not apply in the typical case, was sufficient to hold that the damages claims did not infringe EU law.

 Longmore LJ's other ground for distinguishing Turner v Grovit, that it applies only to anti-suit injunctions, looks more suspect. As with the Sicilian proceedings in The Front Comor, a damages award in The Alexandros T would have "neutralise[d], at any rate in commercial terms, any benefit to [the owners] of a judgment in the Greek claims", rendering the Greek proceedings "commercially pointless".[[94]](#footnote-94) Surely the logic of the European Court case should have applied equally to a damages claim, had the Regulation been triggered. However, Longmore LJ thought otherwise.

# Summary of remedies in respect of proceedings within the EU

In summary, I suggest the following to be the position where suit is brought in the EU, in breach of an arbitration agreement. An anti-suit injunction cannot be awarded, as long as The Front Comor (ECJ) remains good law.[[95]](#footnote-95) For that reason, equitable damages in lieu cannot be awarded in an English court, and hence cannot be awarded in an arbitral tribunal either.[[96]](#footnote-96) The equitable damages conclusions do not follow from the EC Regulation, but from the general English law requirements for such damages in the first case, and by virtue of the application, in the second, of s. 48(5)(a) of the Arbitration Act 1996, in the absence of agreement between the parties to the contrary. I suggest therefore that Flaux J was wrong to award such damages, not because of European, but because of English law.[[97]](#footnote-97)

 According to The Alexandros T, however, common law damages fall outside the scope of Turner v Grovit, and presumably therefore, also of The Front Comor (ECJ). Whether or not this is correct, an arbitral tribunal should be entitled to award them under s. 48(4) of the Arbitration Act 1996, given that the European Court decisions do not apply to tribunal proceedings.

 Indemnities, such as that found in The Alexandros T, are uncommon in arbitration agreements, and common law damages are inapposite to cover future breaches. It cannot therefore be assumed that damages will generally be available, covering future losses as well as past, whether originally sought in a tribunal or a court, where European proceedings are brought in breach of an arbitration clause.

# Proceedings brought outside the EU

The decisions discussed so far have concentrated, not on quantum, but on whether damages are available in the first place. Compania Sud Americana de Vapores SA v Hin-Pro International Logistics Ltd was another case where damages were sought, this time in respect of proceedings outside the EU.[[98]](#footnote-98) The availability of damages was not in dispute, once a breach was established, but in this case there were quantum issues,

 The breach was of what was held to be an English exclusive jurisdiction clause,[[99]](#footnote-99) the breach being the bringing of suit in China. In respect of the negative aspect of their enforcement, exclusive jurisdiction clauses, like the final settlement clauses in The Alexandros T, raise issues similar to those of arbitration clauses. Indeed when Cooke J obseved that "Hin-Pro has contracted not to seek relief in any forum other than England. In breach of that obligation it has sought relief in China",[[100]](#footnote-100) he referred explicity to Lord Mance's comments, referred to earlier, on the "negative promise" in UST v AES.[[101]](#footnote-101) Lord Mance were there referring to an arbitration clause, but Cooke J properly ignored the distinction.[[102]](#footnote-102)

 In CSAV v Hin-Pro, damages were sought additionally to an anti-suit injunction, which was issued but ignored. Of course there was no question of the EC Regulation giving rise to difficulties, but here the equitable remedy was proving ineffective, as opposed to unavailable. This time quantum was at issue. After observing that damages should, of course, be assessed so as to put CSAV in the position they would have been had Hin-Pro not broken the contract, Cooke J addressed the question whether CSAV should show that there would have been no liability, had they been sued in England in accordance with the jurisdiction clause, in order to recover damages in relation to anything other than costs.[[103]](#footnote-103) This might, in many circumstances, be difficult to do, but he continued, observing:[[104]](#footnote-104)

"... that the breach which has occurred is the breach committed by Hin-Pro in bringing foreign proceedings at all. The breach does not consist in failing to bring them in the English courts. The relevant comparison with the no-breach situation is therefore a situation in which no proceedings were brought at all. ..."

The consequence of this was that CSAV did not have to show that Hin-Pro would have been awarded a lower amount here than in China. A similar stance had also been adopted by Longmore LJ in The Alexandros T, which Cooke J cited.[[105]](#footnote-105)

 Though one can understand that Cooke J was anxious to hold the defendants to the agreement which they had "deliberately disregarded",[[106]](#footnote-106) and not to put insuperable difficulties in the way of the claimant, this looks questionable in principle. Though the breach was indeed the bringing of foreign proceedings, the defendants were entitled under the clause to sue in England, and the claimants suffered loss, only to the extent that their liability in the foreign jurisdiction was greater.

 In the event it made no difference, since the claims were in any case time-barred in the UK, but that does not make the reasoning any more satisfactory. There may, however, be another approach. There was no question that the court in CSAV was entitled to award an injunction (indeed, it had done so), nor that Hin-Pro had, in breach of contract, acted so as to deprive CSAV of its benefit. The case cries out for an award of equitable damages, in lieu of the injunction which the defendants had rendered inoperable. Equitable damages were probably required anyway in CSAV, to cover future breaches and losses, since there was no equivalent of the Alexandros T indemnity in the exclusive jurisdiction clause.

 This is admittedly not the situation in which such damages are traditionally awarded. Most of the cases involve situations where granting an injunction would be oppressive,[[107]](#footnote-107) and the court in its discretion awards damages in lieu instead. However, in One Step (Support) Ltd v Morris-Garner, it was accepted that it was enough that damages in lieu are a "just response to circumstances in which the compensation which is the claimant's due cannot be measured (or cannot be measured solely) by reference to identifiable financial loss".[[108]](#footnote-108) Where the defendant has simply ignored the injunction, as in CSAV, the argument for awarding equitable damages is surely stronger than in the normal case.[[109]](#footnote-109)

 Equitable damages remain compensatory, so if CSAV were unable to prove any loss, they should not have recovered damages, whether at common law or in equity. But the basis upon which loss is assessed is different in equity. CSAV had lost the value of the injunction, which may well have been substantial, whether or not they could show a greater damages liability than had they been sued in the English courts; after all, the defendants had presumably chosen to ignore the injunction for a reason. Equitable damages will compensate for this loss.[[110]](#footnote-110)

 Cooke J was upheld in the Court of Appeal,[[111]](#footnote-111) but quantum was not discussed there.

# Third parties

The settlement agreement in The Alexandros T returned yet again to the courts,[[112]](#footnote-112) the Greek proceedings continuing in spite of the English litigation, but this time the live issues revolved around the protection of third parties to the settlement agreements: individual employees and agents of the various insurers, Hill Dickinson LLP (solicitors) and the individual lawyers who had had conduct of the defence, and Charles Taylor Adjusting Ltd and the individual adjuster who had investigated the claim. Actions, which were tortious or delictual in nature, had been brought against these third parties. Flaux J construed the settlement agreements as covering the third party claims, and held the Greek proceedings to be in breach of them.[[113]](#footnote-113) The issue was then as to the remedies, and the case is of interest for the damages claim in two respects: direct claims by the third parties, and claims by the contracting party in respect of losses occasioned to the third parties.

## Direct claims by third party

Flaux J held that the settlement agreements, construed as contracts not to sue, could be enforced by the third parties under the Contracts (Rights of Third Parties) Act 1999. Given that arbitration and exclusive jurisdiction clauses imply an undertaking not to sue other than in the agreed forum,[[114]](#footnote-114) the reasoning adopted by Flaux J in The Alexandros T would apply also to them. Indeed, for arbitration, there is specific provision whose purport is to apply the Arbitration Act 1996.[[115]](#footnote-115)

 The three settlement agreements in The Alexandros T (Hellenic, CMI and LMI) differed in detail. In respect of the Hellenic settlement, the third parties were identified, and so could easily be construed as falling within s. 1 of the Act, but they were not so indentified in the CMI and LMI agreements. It required a generous construction of both the settlements and the statute to reach the conclusion that s. 1 applied to them.[[116]](#footnote-116)

 Just as a settlement agreement can benefit, and be enforced by, third parties under the 1999 Act then, so can an arbitration clause, and but the workings will not always be straightforward. Unlike the contracts not to sue in The Alexandros T, an arbitration clause, like the exclusive jurisdiction clause in The Mahkutai,[[117]](#footnote-117)

"embodies a mutual agreement under which both parties agree with each other as to the relevant jurisdiction for the resolution of disputes. It is therefore a clause which creates mutual rights and obligations".

Such a clause does not always fit well within the 1999 scheme of things,[[118]](#footnote-118) nor, as The Mahkutai itself shows, the Himalaya clause regime.

 For example, suppose that in a sea carriage case, the bill of lading, evidencing a carriage contract between shipper and charterer, has a London arbitration clause, and a Himalaya clause extending the benefit of that clause to third parties, including the shipowner. The cargo is damaged by the negligence of the shipowner, and the shipper (or later holder of the bill of lading) sues the shipowner abroad in tort or delict, avoiding London arbitration.[[119]](#footnote-119) The shipowner, as third party, claims damages for breach of the arbitration clause. Because this is a bill of lading contract, s. 6(5) disapplies the Contracts (Rights of Third Parties) Act 1999, "except that a third party may in reliance on [s. 1] avail himself of an exclusion or limitation of liability in such a contract". An arbitration clause cannot, however, usually be described as an exclusion or limitation of liability,[[120]](#footnote-120) so the 1999 Act will not apply.[[121]](#footnote-121) The Himalaya clause might, but that in The Mahkutai was held not to apply to "a clause which creates mutual rights and obligations".[[122]](#footnote-122) This might have been simply a matter of construction of the particular clause, but another explanation is that Himalaya clauses generally are not well-suited to clauses creating mutual rights and obligations.[[123]](#footnote-123) However, at least the negative aspects of the arbitration clause ought to be enforceable by the shipowner, assuming the Himalaya clause sufficiently wide to cover them.

 There are, of course, many situations outside carriage of goods by sea, or the other s. 6(5) exceptions, where performing and contracting parties will be different, where an arbitration clause may well be enforceable by a third party under the 1999 Act or (conceivably) under a Himalaya clause. Where the 1999 Act applies, it does not work by way of assignment, and by virtue of s. 1(5), the third party can claim remedies, including damages, that would have been available to him "if he had been a party to the contract". He can therefore be fully compensated in respect of his own loss, the problems considered in the next section not arising, as they would, were the third party merely an assignee. Moreover, unlike those of an assignor, the rights of the original contracting party are not divested by the operation of the 1999 Act. The same breach could therefore, in principle, give rise to two (or more) entirely separate sets of arbitration proceedings, for example with different arbitrators being appointed under the main contract, and under the clause whose benefit has been transferred. Obviously, this is not ideal from an efficiency standpoint.[[124]](#footnote-124) Precisely the same problem could arise, were the Himalaya principle to apply.

 Be that as it may, however, The Alexandros T demonstrates the possibility of a third party direct damages claim, and (assuming no s. 6(5) complications), the reasoning appears to apply to an arbitration clause, just as to the three settlement agreements in the case itself.

## Claims by contracting party in respect of third party losses

Flaux J also considered the remedies of the insurers, as the other contracting parties, to protect the third parties. Of course, to the extent that the third parties could sue directly, these claims were not necessary, and were regarded by Flaux J as an alternative to the direct claims by the third parties. Indeed, substantial damages could not be brought by the contracting parites, if the third parties had their own claims.[[125]](#footnote-125)

 The actions being brought in Greece, the obvious remedy of the anti-suit injunction was not, of course, available.[[126]](#footnote-126) Flaux J held that specific performance was.[[127]](#footnote-127) This part of the case is unlikely to be of direct application to arbitration clauses, where it is only the negative obligation that is being enforced,[[128]](#footnote-128) but is of interest in the very narrow view taken of the European Court decision in The Front Comor, Flaux J holding that the reasoning did not extend to the remedy of specific performance.[[129]](#footnote-129) Of the settlement agreements in The Alexandros T itself, Flaux J held that they contained "a continuing obligation to accept, the obverse of which is a continuing promise not to sue". The order also included execution of documents, and hence had a positive element.[[130]](#footnote-130) These special factors took the case beyond enforcement of just a negative undertaking not to sue, and this aspect of it is unlikely to have any direct application in the context of this article. It does, however, show the strength of the judge's determination to avoid the consequences of the ECJ decision in The Front Comor.

## Alexandros T third party damages

The damages issue, as already observed, did not arise given that the third parties were entitled to sue directly. As a fallback position, however, Flaux J would have been prepared to award substantial damages to the contracting party.[[131]](#footnote-131) The difficulty is that where the contract is not to sue a third party, no loss (at least as conventionally defined) is typically occasioned to the contracting party by its breach, apart from costs, which are presumably recoverable, on a normal contractual basis. There is also a principle that generally speaking, a contracting party can claim damages only in respect of his own loss.[[132]](#footnote-132) The question is, then, whether there is anything in the situation here which takes the case out of these general principles.

 In St Martin's Property Corp v Sir Robert McAlpine Ltd,[[133]](#footnote-133) Lord Griffiths took a wider view of loss, as encompassing generally loss of contractual expectation. the third party losses being treated as the contracting party's own. This is sometimes described as the "broad view" in St Martin's, but it is probably more accurate to describe it as simply different.[[134]](#footnote-134) Whereas Lord Griffiths' brethren in the case were prepared to award damages to the contracting party, in respect of losses suffered by the third party (the so-called "narrow view"), Lord Griffiths himself reached the same result by treating the losses as those of the contracting party himself. Since they are his own losses, the contracting party should not, in principle, be required to hold them for the third party, whereas he is on the "narrow" view.[[135]](#footnote-135)

 In DRC Distribution Ltd v Ulva Ltd,[[136]](#footnote-136) Flaux J had doubted whether Lord Griffiths' "broad view" in St Martin's represented the law, and certainly not outside contracts for services.[[137]](#footnote-137) This is probably a correct appraisal. Though the "broad view" was not rejected, nor was it wholeheartedly embraced by Lord Griffiths' brethren in St Martin's itself. In Alfred McAlpine Construction v Panatown,[[138]](#footnote-138) the majority rejected at any rate the proposition that damage to property owned by a third party constituted loss to the claimant, unless the claimant had himself made good the loss.[[139]](#footnote-139) Both St Martin's and Panatown involved contracts for services,[[140]](#footnote-140) and indeed there seems to be no authority for applying Lord Griffiths' view more widely. The situation in The Alexandros T did not involve a service contract, and if the third party is sued in breach of a settlement, exclusive jurisdiction or arbitration clause, there will normally be no question of the contracting party making good the loss.

 In DRC v Ulva, Flaux J preferred "the so-called Albazero exception to the general principle that a party to a contract cannot recover from the contract breaker a third party's loss",[[141]](#footnote-141) the "narrow view" in St Martin's, which was favoured by Lord Griffiths' brethren in St Martin's itself, and by the majority in Panatown. When he came to decide The Alexandros T, Flaux J noted that the damages claim was based on "the so-called 'narrow ground' of the decision of the House of Lords in St Martin's ... ", and though he did not explicitly base his own reasoning on this ground, given his own earlier rejection of the broad view, he was almost certainly adopting the narrow view. If so, his interpretation of that view was extremely broad, requiring no more than that "there was an intention under the settlement agreements to benefit [the] servants or agents".[[142]](#footnote-142) If this is correct, then substantial damages will probably be claimable in almost every third party case, save where the third party himself has a remedy,[[143]](#footnote-143) and as already explained, Flaux J's view on substantial CMI and LMI damages was clearly intended as a fallback position, "if he [was] wrong about the 1999 Act".[[144]](#footnote-144)

 It must be wondered whether Flaux J was right to adopt so wide a view. The authorities lean both ways, and it is interesting to contrast his own rather narrow view in DRC v Ulva.[[145]](#footnote-145) The Albazero exception was originally conceived as narrow, to explain the old case of Dunlop v Lambert, which Lord Diplock was certainly not anxious to extend.[[146]](#footnote-146) Both The Albazero and St Martin's involved damage caused to property which was likely to be (and was) purchased by third parties, so that (as the parties were aware) the loss would not be occasioned to the contracting party. Though Panatown, and also Darlington BC v Wiltshier Northern Ltd,[[147]](#footnote-147) extended the principles in The Albazero and St Martin's, in each case the third party owned the property but was not the party contracting with the builder. The authorities probably preserve a property link (perhaps because it most easily justifies requiring the contracting party to hold the damages for the third party), but do not clearly do so. The majority speeches in Panatown, are equivocal. In Swynson Ltd v Lowick Rose LLP, Lord Sumption would have required a property link for the "narrow" basis,[[148]](#footnote-148) and emphasised the narrowness of the Albazero exception. Lord Neuberger's view was largely similar,[[149]](#footnote-149) but Lord Mance was silent as to the need for the link.[[150]](#footnote-150) Generally, the courts have been cautious about extending the Albazero exception, but on the other hand, the argument that otherwise a substantial claim could disappear into a "legal black hole" does not depend on retention of a property link.[[151]](#footnote-151)

 In conclusion then, while it cannot be said that Flaux J's view in The Alexandros T goes entirely beyond the earlier authorities, it certainly represents a significant widening of the principle, as originally stated in The Albazero.

 Even if substantial damages are, in principle, available, that does not negate the possibility of an injunction or (assuming a positive obligation can be found) specific performance; even substantial damages will not be an adequate remedy, for the reasons rehearsed earlier.[[152]](#footnote-152)

# Conclusions

Arbitration clauses involve an undertaking not to sue other than in the agreed forum, and in principle, damages should be available for their breach. In arbitration, and other situations where there is a similar undertaking, there are now cases where damages have been awarded, but there must surely be question marks over whether they are consistent with general principles governing their award.

 Flaux J in The Front Comor and the Court of Appeal in The Alexandros T were concerned to limit the effects of Turner v Grovit and The Front Comor (ECJ).[[153]](#footnote-153) In so doing, they adopted a very narrow view of the European Court cases, as indeed they had to, since the logic of the ECJ reasoning would appear to affect damages actions, just as surely as the anti-suit injunctions with which they were concerned. In The Front Comor, Flaux J's views represent a significant extension of the situation in which equitable damages are usually awarded.

 In CSAV v Hin-Pro, Cooke J was understandably concerned not to allow the egregious conduct of the defendants to defeat the claimants' rights under the agreement. The basis on which he was prepared to award substantial damages cannot be supported, but the decision can perhaps be justified in other terms, which are consistent with other authorities on damages. In this case, equitable damages may well have been more appropriate.

 In The Alexandros T, Flaux J seemed very determined not to allow the European Court decisions to thwart the claimants' expectations under the settlement agreement. (Again, this is quite understandable.) In his construction of the agreements, his views strongly favour the claimants. He stretches to the limit the application of the Contracts (Rights of Third Parties) Act 1999, the principles upon which specific performance can be awarded, and the recovery by a contracting party of damages suffered by a third party. However, though on the main damages issue, he takes a very wide view of the "narrow" approach in St Martin's, he probably does not go beyond what the authorities allow.

 It is unfortunate that the cases have been coloured by understandable judicial reaction to what appear to be deliberate attempts to avoid agreements. Damages, which should certainly be available, need to be put on to a sound footing. The respective roles of common law and equity need to be established. We do not yet have a mature jurisprudence in this important area.

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1. . Section 6(1) of the Arbitration Act 1996 provides that for the purposes of Part I of that Act, "an 'arbitration agreement' means an agreement to submit to arbitration present or future disputes (whether they are contractual or not)", but on its natural reading it is the disputes, not the arbitration agreement, that need not be contractual. See also generally R. Merkin, "Arbitration Law", Informa (2004 - 2017 looseleaf) at [1.23]; Departmental Advisory Committee on Arbitration Law, "Report on the Arbitration Bill" (1996) at [41] - [42]. [↑](#footnote-ref-1)
2. . [2013] UKSC 35; [2013] 1 W.L.R. 1889; [2013] 2 Lloyd's Rep. 281 SC at [1]. [↑](#footnote-ref-2)
3. . [1942] A.C. 356 HL at 374. [↑](#footnote-ref-3)
4. . There are exceptions. Even the Arbitration Act 1996 is not intended to be an exhaustive code. Breaches of privacy and confidentiality obligations remain governed by the general law: Departmental Advisory Committee on Arbitration Law, fn. 1 above at [10] - [17]. [↑](#footnote-ref-4)
5. . [2013] 1 W.L.R. 1889 SC at [1]. A stay might also be available under the inherent jurisdiction of the court, if for some reason s. 9 does not apply. [↑](#footnote-ref-5)
6. . [1913] A.C. 241 HL at 256, cited Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd [1981] A.C. 909 CA at 945 (Roskill LJ). [↑](#footnote-ref-6)
7. . Starlight Shipping Co v Tai Ping Insurance Co Ltd (The Alexandros T) [2007] EWHC 1893 (Comm); [2008] 1 Lloyd’s Rep. 230; [2008] 1 All ER (Comm) 593 QBD at [12] (Cooke J), cited Southport Success SA v Tsingshan Holding Group Co Ltd (The Anna Bo) [2015] EWHC 1974 (Comm); [2015] 2 Lloyd's Rep. 578; [2016] 2 All E.R. (Comm) 403 QBD at [35] (Phillips J). Similarly, Millett LJ observed in Aggeliki Charis Compania Maritima SA v Pagnan SpA (The Angelic Grace) that "damages are manifestly an inadequate remedy": [1995] 1 Lloyd’s Rep. 87 CA (Civ Div) at 96, cited STX Pan Ocean Co Ltd v Woori Bank [2012] EWHC 981 (Comm); [2012] 2 Lloyd's Rep. 99 QBD at [11] (Flaux J). See also fn. 152 below, and associated text. [↑](#footnote-ref-7)
8. . [1913] A.C. 241 HL at 256, cited Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd [1981] A.C. 909 CA at 945 (Roskill LJ). [↑](#footnote-ref-8)
9. . Above fn. 6, the Common Law Procedure Act 1854 being the starting point. [↑](#footnote-ref-9)
10. . To the same effect, Schiffahrtsgesellschaft Detlev Appen v Voest Alpine Intertrading (The Jay Bola) [1997] 2 Lloyd’s Rep. 279 CA (Civ Div) at 285 (Hobhouse LJ). In The Jay Bola itself, the action to be restrained was taken abroad, and the anti-suit injunction was the appropriate remedy. [↑](#footnote-ref-10)
11. . Departmental Advisory Committee, above fn. 1 at [223], reflecting the principles in UNCITRAL, Model Law on International Commercial Arbitration (1985, revised 2006), cl. 28. [↑](#footnote-ref-11)
12. . e.g. R. Merkin, fn. 1 above at [7.47] - [7.59], esp. [7.57] - [7.59] on the 1996 Act. [↑](#footnote-ref-12)
13. . e.g. cases involving attempts to avoid P & I Clubs pay-to-be-paid clauses: Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd (The Hari Bhum) [2004] EWCA Civ 1598; [2005] 1 Lloyd's Rep. 67; [2005] 1 All E.R. (Comm) 715 CA (Civ Div); London SS Mutual Insurance Association Ltd v Kingdom of Spain (The Prestige (No. 2)) [2015] EWCA Civ 333; [2015] 2 Lloyd's Rep. 33 CA (Civ Div); Shipowners’ Mutual P & I Association (Luxembourg) v Containerships Denizcilik Nakliyat ve Ticaret AS (The Yusuf Cepnioglu) [2016] EWCA Civ 386; [2016] 1 Lloyd's Rep. 641 (CA) (Civ Div). In another context, Assens Havn v Navigators Management (UK) Ltd (Case C-368/16) CJEU. [↑](#footnote-ref-13)
14. . See fn. 7 above. [↑](#footnote-ref-14)
15. . On the availability of the remedy, see generally The Angelic Grace, fn. 7 above at 96 (Millett LJ), cited STX Pan Ocean Co Ltd v Woori Bank, fn. 7 above at [11]; [16] (Flaux J); The Yusuf Cepnioglu, fn. 13 above at [13]; [22] (Longmore LJ); [48]; [50] (Moore-Bick LJ). [↑](#footnote-ref-15)
16. . The Front Comor (Case C-185/07) [2009] 1 A.C. 1138; [2009] 1 Lloyd's Rep. 413 ECJ, giving effect to European Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p 1) (Brussels Jurisdiction Convention). See further fnn. 33 - 40 below, and associated text. [↑](#footnote-ref-16)
17. . e.g. Compania Sud Americana de Vapores SA v Hin-Pro International Logistics Ltd [2014] EWHC 3632 (Comm); [2015] 1 Lloyd's Rep. 301 QBD, affd. other grounds [2015] EWCA Civ 401; [2015] 2 Lloyd's Rep. 1 CA (Civ Div), discussed below, fnn. 98 - 111, and text thereto. Contempt proceedings were indeed taken in this case, this being one of the main issues in the CA. [↑](#footnote-ref-17)
18. . See fn. 7 above, fn. 152 below, and associated text. [↑](#footnote-ref-18)
19. . e.g. R. Merkin, fn. 1 above at [8.80] et seq, and citations therein. [↑](#footnote-ref-19)
20. . The clause was from Asbatankvoy, and was apparently unamended. [↑](#footnote-ref-20)
21. . The substantive issue was whether the owners were protected by the errors of navigation exclusion in the charterparty, or under Art. IV(2)(a) of the Hague Rules: West Tankers Inc v Ras Riunione Adriatica Di Sicurta (The Front Comor) [2005] EWHC 454 (Comm); [2005] 2 Lloyd's Rep. 257 QBD at [6] (Colman J). [↑](#footnote-ref-21)
22. . See further fnn. 59 - 67 below and associated text, noting also the precise formulation of the issue: fn. 59 below. The Sicilian court had reached no decision by the conclusion of the English proceedings. [↑](#footnote-ref-22)
23. . See fn. 21 above; J. Hill, "Anti-suit injunctions and arbitration" [2006] L.M.C.L.Q. 167; Sir Anthony Clarke MR, "The differing approach to commercial litigation in the European Court of Justice and the courts of England & Wales" (2006) 65 Amicus Curiae 2; (2006) 66 Amicus Curiae 2. [↑](#footnote-ref-23)
24. . The Playa Larga [1983] 2 Lloyd’s Rep. 171 CA (Civ Div), appd. The Angelic Grace, fn. 7 above e.g. at 89 (Leggatt LJ); consistent with later principles of construction in Fiona Trust & Holding Corp v Privalov [2007] UKHL 40; [2008] 1 Lloyd's Rep. 254; [2007] 4 All E.R. 951; [2007] 2 All E.R. (Comm) 1053; HL at [11] - [13] (Lord Hoffmann), appd. Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG (The Alexandros T), fn. 87 below at [8] (Longmore LJ). [↑](#footnote-ref-24)
25. . The Angelic Grace, fn. 7 above e.g. at 96 (Millett LJ), cited The Front Comor [2005] 2 Lloyd's Rep. 257, [47]. [↑](#footnote-ref-25)
26. . The Hari Bhum, fn. 13 above at [52]; [65] (Clarke LJ) (third party to P & I liability insurance contract). Though doubt has been cast on other aspects of The Hari Bhum, none has been expressed on these parts of Clarke LJ's judgment. See also further fnn. 64 - 65 below, and associated text. In Assens Havn v Navigators Management (UK) Ltd, fn. 13 above, the CJEU ruled that "a victim entitled to bring a direct action against the insurer of the party which caused the harm which he has suffered is not bound [at all] by an agreement on jurisdiction concluded between the insurer and that party". This was a decision on the Brussels Jurisdiction Convention, which does not apply to arbitration, except possibly on an extremely purposive interpretation: see further fnn. 33; 37 - 45 below, and text thereto. [↑](#footnote-ref-26)
27. . The defendant was a third party claiming under the Finnish equivalent of what was then the Third Parties (Rights against Insurers) Act 1930. It was however held in substance to be a claim to enforce the insurance contract against the insurer: e.g. [2005] 1 Lloyd's Rep. 67 at [58] (Clarke LJ). Similar sentiments were expressed in The Prestige and The Yusuf Cepnioglu, fn. 13 above. [↑](#footnote-ref-27)
28. . See fn. 10 above. The Jay Bola also concerned subrogated insurers, but they had additionally taken an assignment of the charterparty through which they claimed. [↑](#footnote-ref-28)
29. . [2005] 2 Lloyd's Rep. 257 at [24] - [25], Colman J citing [1997] 2 Lloyd’s Rep. 279 at 285 (Hobhouse LJ); at 291 (Sir Richard Scott VC). [↑](#footnote-ref-29)
30. . See fn. 13 above. [↑](#footnote-ref-30)
31. . Under s. 82(2) of the 1996 Act, "[references] ... to a party to an arbitration agreement include any person claiming under or through a party to the agreement", and so the third party would be treated as party to the agreement: also The Jay Bola, fn. 10 above at 285 (Hobhouse LJ). See also R. Merkin, fn. 1 above at [17.17] et seq. [↑](#footnote-ref-31)
32. . See below, fnn. 61 - 66; fnn. 76 - 82; fnn. 107 - 110, and associated text. [↑](#footnote-ref-32)
33. . See fn. 16 above, superseded by Brussels Regulation Recast, European Council Regulation (EC) No 1215/2012/EU: also fn. 54 below, and text thereto. The Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters was in any case adopted as part of UK law by s. 2(1) of the Civil Jurisdiction and Judgments Act 1982. [↑](#footnote-ref-33)
34. . The effects of Arts. 27 - 30. See also fnn. 86; 92 below, and text thereto. [↑](#footnote-ref-34)
35. . Turner v Grovit (Case C-159/02) [2005] A.C. 101; [2004] 2 Lloyd's Rep. 169 ECJ, on a reference from [2001] UKHL 65; [2002] 1 W.L.R. 107 HL. [↑](#footnote-ref-35)
36. . See fnn. 74; 80 below, and associated text. [↑](#footnote-ref-36)
37. . e.g. Art. II(3). [↑](#footnote-ref-37)
38. . e.g. Marc Rich & Co A.G. v Societa Italiana Impianti P.A. (The Atlantic Emperor) (Case C-190/89) [1992] 1 Lloyd's Rep. 342 ECJ at [17]. Also Brussels Recast, fn. 33 above, recital 12 of the preamble. [↑](#footnote-ref-38)
39. . The Front Comor (Case C-185/07) [2009] 1 A.C. 1138 ECJ at [33]. [↑](#footnote-ref-39)
40. . e.g. The Front Comor [2005] 2 Lloyd's Rep. 257 at [11] (Colman J). [↑](#footnote-ref-40)
41. . [2005] 2 Lloyd's Rep. 257 at [10]; [42], Colman J referring to The Hari Bhum, fn. 13 above. In the event, no injunction was granted in The Hari Bhum, but it could have been, in principle. The Hari Bhum is one of many cases involving attempts to avoid P & I Clubs pay-to-be-paid clauses, which the English arbitrators would have enforced: see fn. 13 above. [↑](#footnote-ref-41)
42. . West Tankers Inc v Allianz SpA (The Front Comor) [2007] UKHL 4; [2007] 1 Lloyd’s Rep. 391; [2007] 1 All E.R. (Comm) 794 HL, the leapfrog appeal being provided by s. 12 of the Administration of Justice Act 1969, as amended. [↑](#footnote-ref-42)
43. . [2007] 1 Lloyd’s Rep. 391 at [14] - [19]. Lords Nicholls of Birkenhead, Steyn, Rodger of Earlsferry and Mance agreed with Lord Hoffmann. [↑](#footnote-ref-43)
44. . ibid. at [24] - [25]. [↑](#footnote-ref-44)
45. . The Front Comor (ECJ), fn. 16 above. [↑](#footnote-ref-45)
46. . See fn. 74 below, and associated text. [↑](#footnote-ref-46)
47. . Turner v Grovit, fn. 34 above at [24]. [↑](#footnote-ref-47)
48. . In West Tankers Inc v Allianz SpA (The Front Comor) [2012] EWHC 854 (Comm); [2012] 2 Lloyd's Rep. 103; [2012] 2 All E.R. (Comm) 395 QBD at [38] (Flaux J). On this case see further fnn. 58 - 82 below, and associated text. [↑](#footnote-ref-48)
49. . [2009] 1 A.C. 1138 at [34] (Advocate General); at [30] (ECJ), cited respectively at [2012] 2 Lloyd's Rep. 103 [19]; [21] (Flaux J). [↑](#footnote-ref-49)
50. . See fnn. 80; 94 below, and associated text. [↑](#footnote-ref-50)
51. . The Great Repeal Bill: White Paper at [2.14]. The paper can be found at: <https://www.gov.uk/government/publications/the-great-repeal-bill-white-paper/legislating-for-the-united-kingdoms-withdrawal-from-the-european-union> (HTML version), or <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/604516/Great_repeal_bill_white_paper_accessible.pdf> (PDF file). [↑](#footnote-ref-51)
52. . ibid. at [2.16]. [↑](#footnote-ref-52)
53. . European Union (Withdrawal) Bill 2017, cll. 6(3) - 6(5); Explanatory Notes at [105]; [107]. For full text of Explanatory Notes: <http://www.statewatch.org/news/2017/jul/eu-brexit-rel-bill-explanatory-notes.pdf> (PDF file). [↑](#footnote-ref-53)
54. . See fn. 33 above. Art. 1(2)(d) is unchanged, but recital 12 of the preamble, explaining it, is greatly expanded. [↑](#footnote-ref-54)
55. . Inference from Gazprom Oao (Case C-536/13) [2015] 1 W.L.R. 4937; [2015] 1 Lloyd's Rep. 610 CJEU at [91] (Advocate General): recital 12 in the Recast preamble, in the manner of retroactive interpretative law, explained how the Art. 1(2)(d) exclusion should always have been interpreted; A. Briggs, fn. 79 below at 287 describes the argument as "an exercise in legal gymnastics". The CJEU judgment itself appears to support but distinguish The Front Comor (ECJ): e.g. [32] - [44]. [↑](#footnote-ref-55)
56. . See fnn. 98 - 110 below, and text thereto. [↑](#footnote-ref-56)
57. . West Tankers Inc v Allianz SpA (The Front Comor) [2012] EWCA Civ 27; [ [2012] 1 Lloyd's Rep 398; [2012] 2 All E.R. (Comm) 113; CA (Civ Div), on enforcement under Arbitration Act 1996, s. 66. [↑](#footnote-ref-57)
58. . On the appointment of the fresh tribunal, West Tankers Inc v Allianz SpA (The Front Comor), fn. 48 above at [17] (Flaux J). [↑](#footnote-ref-58)
59. . [2012] 2 Lloyd's Rep. 103 at [3]. [↑](#footnote-ref-59)
60. . ibid. at [63]. [↑](#footnote-ref-60)
61. . ibid. at [16]; also clear from [77]. [↑](#footnote-ref-61)
62. . e.g. Jaggard v Sawyer [1995] 1 W.L.R. 269 CA (Civ Div) at 276-277 (Sir Thomas Bingham MR); see also at 284 (Millett LJ). [↑](#footnote-ref-62)
63. . cf. The Alexandros T, fn. 87 below, and associated text, where the agreement contained an express indemnity against the consequences of all (including future) claims. There, a declaration of entitlement to the indemnity would have achieved the same result. On the terms of relief sought there, The Alexandros T, fn. 86 below SC at [18] (Lord Clarke); referred to fn. 87 below CA at [18] (Longmore LJ). [↑](#footnote-ref-63)
64. . See fn. 26 above, and associated text. [↑](#footnote-ref-64)
65. . See fnn. 26; 41 above. [↑](#footnote-ref-65)
66. . e.g. Jaggard v Sawyer, fn. 62 above at 284-285 (Millett LJ), though not necessarily that the injunction could or would have been granted: Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd [2009] UKPC 45; [2011] 1 W.L.R. 2370 PC (Jersey) at 48 (Lord Walker of Gestingthorpe JSC). [↑](#footnote-ref-66)
67. . Note that this was a s. 69 (error of law) appeal. There was no challenge to the "substantive jurisdiction" of the tribunal under s. 67, and nor was this a case of "the tribunal exceeding its powers" within s. 68(2)(b). [↑](#footnote-ref-67)
68. . The Front Comor (ECJ), fn. 16 above. [↑](#footnote-ref-68)
69. . The Front Comor, fn. 48 above at [23] - [25]. Art. 5(3) allows the defendant to be sued "in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur", i.e. Sicily. [↑](#footnote-ref-69)
70. . ibid; also at [51] - [52]. [↑](#footnote-ref-70)
71. . ibid. at [47] (Flaux J). [↑](#footnote-ref-71)
72. . ibid. [↑](#footnote-ref-72)
73. . ibid. at [26]. [↑](#footnote-ref-73)
74. . ibid. at [53] - [54], the quote being from [54]. See also at [71]: "the Advocate General has recognised that the arbitral tribunal is free to make an inconsistent award on the merits". Surely, however, a damages award for pursuing proceedings elsewhere is quite dissimilar to an award on the merits. [↑](#footnote-ref-74)
75. . See fn. 62 above. [↑](#footnote-ref-75)
76. . UST-Kamenogorsk Hydropower Plant JSC v AES UST-Kamenogorsk Hydropower Plant LLP, fn. 2 above, as interpreted in Southport Success SA v Tsingshan Holding Group Co Ltd (The Anna Bo), fn. 7 above at [24] - [25] (Phillips J). [↑](#footnote-ref-76)
77. . See fn. 66 above. [↑](#footnote-ref-77)
78. . Gazprom Oao (Case C-536/13), fn. 52 above CJEU. [↑](#footnote-ref-78)
79. . ibid. Briggs distinguishes between the court exercising an auxiliary and an original jurisdiction, The Front Comor ECJ covering only the latter: A. Briggs, "Arbitration and the Brussels Regulation again" [2015] L.M.C.L.Q. 285. [↑](#footnote-ref-79)
80. . Briggs, ibid., in justifying his distinction between a court exercising an auxiliary and an original jurisdiction, observes at 287 that "a judgment given in terms of an award claims to have no effect outside the territorial jurisdiction of the court". But this is also true of an anti-suit injunction, which is a personal restraint on a party within the jurisdiction. I suggest that Briggs' arguments are unconvincing. [↑](#footnote-ref-80)
81. . See Departmental Advisory Committee on Arbitration Law, fn. 1 above at [234]. [↑](#footnote-ref-81)
82. . See generally on s. 48, R. Merkin, fn, 1 above at [18.55]; [18.71] - [18.72]. [↑](#footnote-ref-82)
83. . See fn. 7 above. [↑](#footnote-ref-83)
84. . See fn. 25 above, and text thereto. In The Alexandros T, Cooke J also made observations on the relationship between s. 44 of the Arbitration Act 1996 and s. 37 of the Supreme Court Act 1981: [2008] 1 Lloyd’s Rep. 230 at [16] - [37]. [↑](#footnote-ref-84)
85. . Given effect by Council Regulation (EC) No 44/2001, fn. 16 above. [↑](#footnote-ref-85)
86. . Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG (The Alexandros T) [2013] UKSC 70; [2014] 1 Lloyd's Rep. 223; [2014] 1 All E.R. 590 SC, holding that neither Arts. 27 nor 28 justified a stay. [↑](#footnote-ref-86)
87. . Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG (The Alexandros T) [2014] EWCA Civ 1010; [2014] 2 Lloyd's Rep. 544 CA (Civ Div), on appeal from [2011] EWHC 3381 (Comm); [2012] 1 Lloyd's Rep. 162 QBD (Burton J). [↑](#footnote-ref-87)
88. . See fn. 5 above. [↑](#footnote-ref-88)
89. . There was a different third party issue considered subsequently: see fnn. 112 - 152 below, and associated text. [↑](#footnote-ref-89)
90. . See fn. 74 above, and associated text. [↑](#footnote-ref-90)
91. . [2014] 2 Lloyd's Rep. 544 CA at [15]. [↑](#footnote-ref-91)
92. . See fn, 86 above: the causes of action were not the same under Art. 27, but in respect of related actions under Art. 28, the English court was first seised. [↑](#footnote-ref-92)
93. . [2014] 2 Lloyd's Rep. 544 CA at [15]. [↑](#footnote-ref-93)
94. . [2014] 1 Lloyd's Rep. 223 SC at [132] (Lord Neuberger). [↑](#footnote-ref-94)
95. . See fnn. 51 - 55 above, and associated text. [↑](#footnote-ref-95)
96. . See fnn. 81 - 82 above, and associated text. [↑](#footnote-ref-96)
97. . ibid. [↑](#footnote-ref-97)
98. . See fn. 16 above. [↑](#footnote-ref-98)
99. . One of the issues, on which the position of Chinese and English courts differed, was over whether the jurisdiction clause was truly exclusive. This was the main substantive issue in the CA: [2015] 2 Lloyd's Rep. 1, esp. at [43] - [78] (Christopher Clarke LJ). [↑](#footnote-ref-99)
100. . [2015] 1 Lloyd's Rep. 301 QBD at [38]. [↑](#footnote-ref-100)
101. . See fn. 5 above. [↑](#footnote-ref-101)
102. . Indeed, he treated Lord Mance's comments as if they concerned exclusive jurisdiction: [2015] 1 Lloyd's Rep. 301 at [38]. [↑](#footnote-ref-102)
103. . ibid. at [37]. [↑](#footnote-ref-103)
104. . ibid. at [38]. [↑](#footnote-ref-104)
105. . [2014] 2 Lloyd’s Rep. 544 CA at [20], where, however, the claims in England had failed (because permission had been refused to advance them), so the issue did not arise for decision. [↑](#footnote-ref-105)
106. . [2015] 1 Lloyd's Rep. 301 at [39]. [↑](#footnote-ref-106)
107. . The injunction being refused on the basis of the criteria in Shelfer v City of London Electric Lighting Co [1895] 1 Ch. 287 CA (Civ Div) at 322– 323. [↑](#footnote-ref-107)
108. . [2016] EWCA Civ 180; [2017] Q.B. 1 CA (Civ Div) at [80], Christopher Clarke LJ citing WWF — World Wide Fund for Nature v World Wrestling Federation Entertainment Inc [2008] 1 W.L.R. 445 CA (Civ Div) at [59] (Chadwick LJ). [↑](#footnote-ref-108)
109. . In One Step, Longmore LJ thought relevant that the breach there was deliberate: [2017] Q.B. 1 at [141]; [147]. [↑](#footnote-ref-109)
110. . A similar measure of damages was applied in Jaggard v Sawyer, fn. 62 above (where the claimants could also not show a financial loss); often described as Wrotham Park damages after Wrotham Park Estate Co Ltd v Parkside Homes Ltd [1974] 1 W.L.R. 798 CA (Civ Div): e.g. [2017] Q.B. 1 at [50]. [↑](#footnote-ref-110)
111. . See fn. 17 above. [↑](#footnote-ref-111)
112. . Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG (The Alexandros T) [2014] EWHC 3068 (Comm); [2014] 2 Lloyd's Rep. 579; [2015] 2 All E.R. (Comm) 747 (Flaux J). [↑](#footnote-ref-112)
113. . The three settlements differed in detail. That all three extended to cover claims against third parties was by no means self-evident, and this part of the case involved a fairly generous application of the construction principles from Rainy Sky SA v Kookmin Bank [2011] 1 W.L.R. 2900 SC: [2014] 2 Lloyd's Rep. 579 at [41] - [68]. [↑](#footnote-ref-113)
114. . See fn. 5 above. [↑](#footnote-ref-114)
115. . Arbitration Act 1996, s. 8. [↑](#footnote-ref-115)
116. . Section 1(1)(b) requires that the term "purports to confer a benefit" on the third party, and s. 1(3) requires the third party to be "expressly identified in the contract by name, as a member of a class or as answering a particular description". Flaux J had already construed “underwriters” in the settlement agreements as encompassing servants or agents, and held that sufficient to identify the third parties as members of a class, within s. 1(3): [2014] 2 Lloyd's Rep. 579 at [88]. [↑](#footnote-ref-116)
117. . [1996] A.C. 650 PC at 666 (Lord Goff). [↑](#footnote-ref-117)
118. . e.g. Fortress Value Recovery Fund I LLC v Blue Skye Special Opportunities Fund LP [2013] EWCA Civ 367; [2013] 1 W.L.R. 3466; [2013] 1 Lloyd's Rep 606; [2013] 2 All E.R. (Comm) 315 CA (Civ Div). See generally R. Merkin, fn. 1 above at [17.55]. [↑](#footnote-ref-118)
119. . In effect Homburg Houtimport BV v Agrosin Private Ltd (The Starsin) [2003] UKHL 12; [2004] 1 A.C. 715 HL, but with the arbitration clause and action abroad from The Front Comor. It is also necessary to suppose that the arbitration clause is of sufficient width to cover the tort or delict action, as it was held to be in The Front Comor. [↑](#footnote-ref-119)
120. . Except perhaps for a Scott v Avery clause: Scott v Avery (1856) 5 H.L. Cas. 811 HL; also Privity of Contract: Contracts for the Benefit of Third Parties, Law Com. No. 242 (1996) at [14.17], fn. 23. [↑](#footnote-ref-120)
121. . The effect of disapplying s. 1. [↑](#footnote-ref-121)
122. . See fn. 117 above at 666. [↑](#footnote-ref-122)
123. . ibid., the passage being equivocal whether Lord Goff's objection applies generally, or just to the construction of the particular clause. A fuller discussion (which would need to consider the juristic basis of the Himalaya clause) is beyond the scope of this article. [↑](#footnote-ref-123)
124. . e.g. R. Merkin, fn. 1 above at [17.4] - [17.6]. [↑](#footnote-ref-124)
125. . See fnn. 143 - 144 below, and associated text. [↑](#footnote-ref-125)
126. . The Front Comor (ECJ), fn. 16 above, cited at [2014] 2 Lloyd's Rep. 579 at [74]. [↑](#footnote-ref-126)
127. . See fn. 112 above at [69] - [72]. [↑](#footnote-ref-127)
128. . Indeed, the conventional view is that "the status of an arbitration clause in England is that it will not be specifically enforced": Pena Copper Mines Ltd v Rio Tinto Co Ltd (1911) 105 L.T. 846 at 852 (Fletcher Moulton LJ), a case in which an anti-suit injunction was awarded. [↑](#footnote-ref-128)
129. . [2014] 2 Lloyd's Rep. 579 at [74]. [↑](#footnote-ref-129)
130. . ibid. at [78]. [↑](#footnote-ref-130)
131. . ibid. at [90] - [93]. [↑](#footnote-ref-131)
132. . Though both Lords Goff and Millett (dissenting) expressed doubts in Alfred McAlpine Construction Ltd v Panatown Ltd [2001] 1 A.C. 518, this was accepted as established law by the majority judges in the case: e.g. at 522 (Lord Clyde); 562 (Lord Jauncey); also Lord Browne-Wilkinson, in the St Martins case, fn. 133 below at 114G. [↑](#footnote-ref-132)
133. . [1994] 1 A.C. 85 HL, cited [2014] 2 Lloyd's Rep. 579 at [90]. [↑](#footnote-ref-133)
134. . e.g. Panatown [2001] 1 A.C. 518 at 532 (Lord Clyde); 573 (Lord Jauncey). [↑](#footnote-ref-134)
135. . The difference between majority and minority views in Alfred McAlpine Construction Ltd v Panatown Ltd, fn. 132 above. [↑](#footnote-ref-135)
136. . [2007] EWHC 1716 (QB). [↑](#footnote-ref-136)
137. . [2007] EWHC 1716 (QB) at [69] - [70]. [↑](#footnote-ref-137)
138. . [2001] 1 A.C. 518. [↑](#footnote-ref-138)
139. . [2001] 1 A.C. 518 at 533 - 534 (Lord Clyde); 570 - 571 (Lord Jauncey); 577 (Lord Browne-Wilkinson). Lord Clyde appeared to doubt the "broad" approach more generally, at 534. See also [2007] EWHC 1716 (QB) at [76], where Flaux J thought that the majority had rejected the "broader" ground. [↑](#footnote-ref-139)
140. . Also Darlington BC v Wiltshier Northern Ltd [1995] 1 W.L.R. 68 CA (Civ Div). [↑](#footnote-ref-140)
141. . [2007] EWHC 1716 (QB) at [71], referring to The Albazero [1977] A.C. 774 HL, where a CIF seller attempted to recover losses suffered by his buyer who was time-barred. [↑](#footnote-ref-141)
142. . [2014] 2 Lloyd's Rep. 579 at [93]. [↑](#footnote-ref-142)
143. . As in Panatown itself, fn. 132 above, where, on a 3 - 2 majority, a claim for substantial damages failed for that very reason, or in DRC v Ulva, fn. 136, where the agreement was clearly expressed to be personal to the parties. [↑](#footnote-ref-143)
144. . [2014] 2 Lloyd's Rep. 579 at [90]. [↑](#footnote-ref-144)
145. . [2007] EWHC 1716 (QB) at [83]; [85]. [↑](#footnote-ref-145)
146. . Dunlop v Lambert (1839) 6 Cl. & F. 600 HL, explained and distinguished in The Albazero [1977] A.C. 774 HL (Lord Diplock). [↑](#footnote-ref-146)
147. . [1995] 1 W.L.R. 68 CA (Civ Div). [↑](#footnote-ref-147)
148. . [2017] 2 W.L.R. 1161 SC at [17]. [↑](#footnote-ref-148)
149. . ibid. at [102] - [104]; [107]. [↑](#footnote-ref-149)
150. . ibid. at [54]. [↑](#footnote-ref-150)
151. . This colourful phrase originating in GUS Property Management Ltd v Littlewoods Mail Order Stores Ltd 1982 SC (HL) 157 at 166 (Lord Stewart). [↑](#footnote-ref-151)
152. . See fnn. 6 - 7 above, and associated text. Also [2014] 2 Lloyd's Rep. 579 at [80]: "damages would clearly be an inadequate remedy". [↑](#footnote-ref-152)
153. . For a clear expression of his dislike of the ECJ positiion in The Front Comor, see [2012] 2 Lloyd's Rep. 103 at [73] (Flaux J). [↑](#footnote-ref-153)